

FREDERICK COUNTY BOARD OF APPEALS
STAFF REPORT FOR MARCH 24, 2021 @ 7pm

Case Number: B-22-05

Appellant: Persistence Solar Project

Appeal: Claiming an Appeal of Administrative Error regarding Division of Planning and Permitting's Determination that the proposed Community Energy Generating System is not a permitted accessory use pursuant to the Frederick County Code.

Location: Tax Map 32, Parcels 019, 70 & 125
Tax ID # 1115326034 (136.8 acres)

Planning Region: Frederick

Zoning District: Agricultural (A)

Comp. Plan Designation: Agricultural/Rural

Applicable Ordinances: Sec. 1-19-3.230 APPEALS
Sec. 1-19-5.220 AGRICULTURAL ZONING DISTRICT
Sec. 1-19-7.300 AGRICULTURAL DISTRICT
Sec. 1-19-8.200
Sec. 1-19-8.205.5. SOLAR FACILITY, COMMUNITY ENERGY GENERATING SYSTEM
Sec. 1-19-11.100 DEFINITIONS

- Accessory Use or Structure
- Agricultural Activity
- Solar Facility, Community Energy Generating System

BACKGROUND:

The Appellant has filed this appeal, by letter dated December 16, 2021 (Appellee's Exhibit 1), in connection with a Determination Letter by the Zoning Administrator, dated November 17, 2021, (Appellee's Exhibit 2) wherein the Division denied the Appellants' request for approval of a Solar Facility, Community Energy Generating System on a 138.6 acre parcel of land at Tax Map 32, Parcels 19, 70 and 125, Tax ID# 1115326034 and known as 12301 Catoctin Furnace Road, (the "Subject Parcel"). The Determination Letter concluded that based upon the information provided staff could not find that the proposed Community Energy Generating System is an accessory use to the parcels comprising 12301 Catoctin Furnace Road.

The Appellant has requested that the Board of Appeals find that the Zoning Administrator erred when it determined that the proposed Community Energy Generating System, known generally as "Persistence Solar" (Project) was not permitted as an accessory use on the property.

APPLICABLE LAW:

§ 1-19-3.230. APPEALS.

(A) Appeals to the Board of Appeals may be taken by any person aggrieved or by any officer, department, board or bureau of the jurisdiction affected by any decisions of the administrative officer. Such appeal shall be taken within 30 days after the date of the action or decision being appealed, by filing with the officer from whom the appeal is taken and with the Board of Appeals a notice of appeal specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the Board all the papers constituting the record upon which the action appealed from was taken.

(B) An appeal stays all proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the Board of Appeals after notice of appeal shall have been filed with him that by reason of the facts stated in the certificate a stay would, in his opinion, cause imminent peril to life or property. In such case proceedings shall not be stayed otherwise than by a restraining order which may be granted by the Board of Appeals or by a court of record on application on notice to the officer from whom the appeal is taken and on due cause shown.

(C) The Board of Appeals shall fix a reasonable time for the hearing of the appeal, give public notice thereof, as well as due notice to the parties in interest, and decide the same within a reasonable time. Upon the hearing any party may appear in person or by agent or by attorney.

(D) In exercising the above-mentioned powers such Board may, in conformity with MD. Ann. Code, Art. 66B, as amended, reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination appealed from and make such order,

requirement, decision or determination as ought to be made, and to that end shall have all the powers of the officer from whom the appeal is taken.

§ 1-19-5.220. AGRICULTURAL ZONING DISTRICT (A).

The purpose of the Agricultural District (A) is to preserve productive agricultural land and the character and quality of the rural environment and to prevent urbanization where roads and other public facilities are scaled to meet only rural needs.

§ 1-19-7.300. AGRICULTURAL DISTRICT.

(A) In the Agricultural Zoning District, the preferred use is agriculture. The operation at any time of any machinery used in farming procedures and all other agricultural operations shall be permitted and have preference over all other uses.

§ 1-19-8.200. PURPOSE AND INTENT.

Although customary accessory uses are expected to develop in conjunction with a principal permitted use, the accessory uses listed in Division 2, Accessory Uses, will receive approval only when specific criteria have been met.

§ 1-19-8.205.5. SOLAR FACILITY, COMMUNITY ENERGY GENERATING SYSTEM.

Solar Facility, Community Energy Generating System is an accessory use in all zoning districts and the facility may be located on a different parcel of land than that of the subscribers. A zoning certificate must be obtained prior to construction or installation of the facility.

§ 1-19-11.100. DEFINITIONS:

ACCESSORY USE OR STRUCTURE. A subordinate use or structure, which is located on the same lot as the principal use or building except as outlined in § 1-19-8.250.1(F) and serves a purpose customarily incidental to the principal use or building. No accessory structures shall be permitted in designated floodplain areas.

AGRICULTURAL ACTIVITY. Land used exclusively as a bona fide agricultural operation by the owner or tenant. The use of land for agricultural purposes includes farming, viticulture (grape production), fish culture, animal and poultry husbandry, and equine activities. Necessary accessory uses such as packing, treating, or storing of produce, composting and power generation from farm animal waste are allowed provided that the operation of the accessory use is clearly incidental to the agricultural activity. The business of intensive swine feeding operations, garbage feeding of hogs, fur farms or the raising of animals for use in medical or other tests or experiments, commercial slaughtering of livestock, poultry, fish or meat processing is excluded from this definition.

SOLAR FACILITY, COMMUNITY ENERGY GENERATING SYSTEM. A photovoltaic solar energy system which satisfies the requirements of Public Utilities Article, § 7-306.2 of the Ann. Code of Md.

DOCUMENTATION: (All of which are incorporated herein)

- Exhibit # 1 – September 28, 2021, email from Project to Staff
- Exhibit # 2 – October 13, 2021, email from Project to Staff
- Exhibit # 3 – Appellee's November 17, 2021, letter stating that staff is unable to find, based on the information provided, that the Project is an accessory use.
- Exhibit # 4 – Appellant's December 16, 2021, Letter noting appeal
- Exhibit # 5 – Appellee's Redactions to Appellant's Dec 16, 2021, letter with redactions highlighted as representing evidence not before staff.
- Exhibit # 6 - Persistence Solar Plans, consisting of eight (8) pages
- Exhibit # 7 – Staff GIS Maps (4)

DISCUSSION:

The proposed Project is to be located on a 138.6-acre parcel known as 12301 Catoctin Furnace Road. Of the 138.6 acres 81.4 acres or 58.7 % is used to grow hay. Out of that 81.4 acres, Appellant plans to use 19.31 acres (23.7 % of the land used to grow hay and 13.9 % of the total land) to create community solar. This would leave the Appellant 62.09 acres of the 138.6 acres (44.7 %) to grow hay. There are no barns, houses or other structures on the parcel.

While a Community Solar Facility is a permitted accessory use in all zoning districts and the facility may be located on a different parcel of land than that of the subscribers, the facility must still qualify as an accessory. The Zoning Administrator has not received evidence that Project would be accessory to any other use on the property, much less to an agricultural activity.

Staff has also not been able to find that using 44.7 % (62.09 acres out of 138.6 acres) of a parcel without any other uses or structures, such as barns, sheds, etc., to farm hay constitutes a bona fide agricultural operation. The Frederick County Code defines Agricultural Activity in part as "Land used EXCLUSIVELY as a BONA FIDE agricultural operation...." (Emphasis added) When only 44.7 percent or even 58.7 percent of the land is being used to grow hay it does not qualify as an exclusively bona fide agricultural activity without more.

Section 1-19-11.100 of the Frederick County Code, Definitions, gives examples of agricultural activities and valid accessory uses commonly related to agriculture. The Code states that the accessory use is clearly incidental to the agricultural activity. Use as a Community Solar facility is not incidental to growing hay.

The Frederick County Code defines, in part, an accessory use or structure as being “a subordinate use or structure, which is located on the same lot as the principal use or building ... and serves a purpose customarily **incidental to the principal use** or building.” (Emphasis added). A subordinate use must be secondary or incidental to a principal use or building. It must not be the principal use. Assuming, for the purpose of argument, that the principal use is agriculture and not something else, then there has not been any evidence provided to the Zoning Administrator, at the time of his decision, that generating electricity is incidental to growing hay on a parcel without any buildings or structures. In fact, the Zoning Administrator is unaware of any electrical service to the property at all.

The application did not contain any evidence or argument related to how a proposed Community Solar Facility is customarily incidental to hay farming, especially in this instance where there has been no evidence that the hay farming operation is a bona fide agricultural activity. Additionally, the application is totally unclear as to how a proposed Community Solar Facility is customarily incidental to hay farming if in this instance hay farming could be found to be a bona fide agricultural activity.

Therefore, based on the evidence provided to the Zoning Administrator and the applicable law, the Zoning Administrator did not err in his November 17, 2021 Determination.

ACTION NEEDED:

The Zoning Administrator requests that the Board review the Appellant's request per Sections 1-19-3.230, 1-19-5.220, 1-19-7.300, 1-19-8.200, 1-19-8.205.5 and 1-19-11.100 of the Frederick County Zoning Ordinance and render a decision upholding the November 17, 2021 Determination Letter from the Zoning Administrator.